Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RUSSELL REED,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does *Young v. United States Ex Rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) and Federal Rule of Criminal Procedure 42(b) require an independent prosecutor in every out-of-court criminal contempt proceeding?

II. Is the right to an independent prosecutor in a criminal contempt proceeding a fundamental right that only the defendant may waive?

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OPINIONS BELOW

The Eleventh Circuit Court of Appeals affirmed the petitioner's conviction for criminal contempt in a published opinion, *In re: Russell Reed*, 161 F.3d 1311 (11th Cir. 1998). (A copy of the opinion is attached as Appendix A.) On February 12, 1997 in the case of *Mitchell Partners, L.P., et al. v. Janis Risberg, et al.*, 1:96-CV-735 (N.D. Ga.), the district court found the petitioner in contempt of court. (R8-38). (A copy of excerpts of the transcript of the hearing is attached as Appendix B.)

STATEMENT OF JURISDICTION

Jurisdiction is conferred on this Court by Title 23, United States Code, § 1254(1). This petition seeks review of a judgment by a panel of the Eleventh Circuit Court of Appeals. The Court of Appeals issued its opinion December 3, 1998.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rules of Criminal Procedure, Rule 42(b)

> **Disposition Upon Notice and Hearing.** A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trail by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged

> involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

Amendment XIV, Section I of the United States Constitution

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Course of the Proceedings

On December 19, 1996, Mitchell Partners, L.P. filed a "Motion For Order To Show Cause Why Defendant Russell Reed Should Not Be Held In Contempt, Or In The Alternative Why An Injunction Should Not Issue." (R5-42). At the show cause hearing on January 18, 1997, the district court stated its intention to sever the request for a contempt citation from the request for injunctive relief. (R6-3). The court subsequently found that Reed (hereinafter referred to as "petitioner" or "Reed") was in willful and wanton violation of a September 1996 consent order. (R6-24). The injunction was granted and the petitioner was directed to appear at a later date to answer to the criminal contempt charge. (R6-25-26).

On February 12, 1997, the court re-convened to address the criminal contempt. (R8). There was no independent prosecutor present at the hearing. The petitioner presented testimony from his counsel in an attempt to justify his actions which already had been found to be in violation of the consent order at the January 1997 hearing. (R8-8-20). The petitioner was convicted of criminal contempt at the conclusion of the February evidentiary hearing.

Reed was sentenced to serve four months in the custody of the Bureau of Prisons for the contempt. (R75). The trial court has stayed the reporting date until thirty days after completion of the appellate process.

In an opinion dated December 3, 1998, a panel of the Eleventh Circuit Court of Appeals affirmed Reed's conviction.

B. Statement of Facts

On or about March 26, 1996, a class action filed in the Superior Court of Fulton County, Georgia, against the petitioner was removed to the United States District Court for the Northern District of Georgia. (R1-1). *Mitchell Partners, L.P. et al. v. Janis Risbergs et al.*, 1:96-CV-735 (N.D. Ga). The underlying complaint brought by the minority shareholders of General Builders Corporation (GBC) alleged that Reed, GBC's president, and others had breached their fiduciary duty, and engaged in fraud and corporate waste.

Following the removal, all parties, including the petitioner, signed a consent order appointing a receiver to manage the affairs of the corporation. Later, on December 16, 1996, Reed filed a bankruptcy petition on behalf of the corporation. On December 19, 1996, the class-action plaintiffs filed the "Motion For Order To Show Cause Why Defendant Russell Reed Should

Not Be Held In Contempt, Or In The Alternative Why An Injunction Should Not Issue." (R5-42). A show cause hearing followed on January 8, 1997.

On January 23, 1997, the court first addressed the issue of whether an independent prosecutor should be appointed to prosecute the criminal contempt case. (R7). The court continued the hearing again to determine whether the appointment of an independent prosecutor was necessary (R7-2-7).

At the February 12, 1997 hearing, the petitioner's counsel stated that Reed waived the necessity for a special prosecutor. (R8-2). Counsel did not state whether he consulted with Reed or summarize their discussions. Reed never placed his waiver on the record; Reed was never questioned by the court to determine whether he agreed with counsel in announcement. The criminal contempt hearing proceeded with the movant's counsel assuming the role of the prosecutor. Reed was found guilty of contempt by the trial judge.

REASONS FOR GRANTING THE WRIT

I.

THE PETITIONER WAS DENIED PROCEDURAL DUE PROCESS BY THE DISTRICT COURT PROCEEDING WITHOUT APPOINTING AN INDEPENDENT PROSECUTOR TO PROSECUTE HIS OUT OF COURT CRIMINAL CONTEMPT CITATION.

The Eleventh Circuit held that it was not error to prosecute the petitioner for an out-of-court contempt without appointing an independent prosecutor. This holding is contrary to the rule of law in sister circuits, as well as contrary to the Federal Rules of Criminal Procedure. The writ should be granted to resolve these conflicts.

The district court violated procedural due process by failing to appoint an independent prosecutor to prosecute the criminal contempt proceedings brought against Reed. First, Rule 42(b) of the Federal Rules of Criminal Procedure provides that notice of a criminal contempt proceeding:

> . . . shall be given orally by a judge in the presence of the defendant, or on **application of the United States Attorney or of an attorney appointed by the court for that purpose**, by an order to show cause or an order of arrest.

(Emphasis added). Moreover, the Court in *Young v. United States Ex. Rel Vuitton*, 481 U.S. 787 (1987), held that the appointment of the opposing counsel in the underlying civil litigation to prosecute a criminal contempt proceeding was reversible error. A court should ordinarily first request the appropriate prosecuting authority to prosecute contempt actions, and should appoint a private prosecutor only if that request is denied. *Id.* at 801. The Court observed that appointing an interested party as the prosecutor constitutes serious, perhaps plain, error.

After determining that it is error for the trial court to appoint an interested attorney to prosecute an individual for criminal contempt charges, the Court then examined whether the appointment of such an interested prosecutor was harmless error. A plurality found:

> We have held that some errors "are so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case." We find that the appointment of an interested prosecutor is such an error.

Id. at 809-810 (*citing Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

> A concern for actual prejudice in such circumstances misses the point, for what is at stake is the public perception of the integrity of our criminal justice system . . . Society's interest in disinterested prosecution therefore would not be adequately protected by harmless-error analysis, for such analysis would not be sensitive to the fundamental nature of the error committed.

Id. at 811-812.

In his concurrence, Justice Blackmun stated that the act of appointing an interested party's counsel to prosecute for criminal contempt is a violation of due process. *Id.* At 815. The holding of the *Young* case is very clear:

> In this case, however, we establish a categorical rule against the appointment of an interested prosecutor, adherence to which requires no subtle calculations of judgment. Given the fundamental and pervasive effects of such an appointment, we therefore hold that the harmless-error analysis is inappropriate in reviewing the appointment of an interested prosecutor in a case such as this.

Id. at 814 (Blackmun, J. concurring).

Since *Young*, a split in the circuit courts of appeal has developed in determining whether the appointment of a special prosecutor is required in every criminal contempt action. The First Circuit examined the issue in *In re Grand Jury Proceedings*, 875 F.2d 927 (1st Cir. 1989), where an Assistant

United States Attorney was convicted of criminal contempt for violating a court order staying grand jury proceedings.

> Although the question is not free from doubt, we believe that not all out-of-court contempt proceedings are fatally flawed by the failure to appoint a prosecutor. Where, as here, the judge is impartial and the evidence is so simple that the judge is not diverted from the role of impartial judge and fact finder, we are not convinced that a prosecutor must be appointed.

875 F.2d at 934. The First Circuit distinguished its case from the situation presented in *Young*, where the prosecutor was biased, creating the possibility that he or she would proceed in total disregard of a defendant's legitimate interest. *Id.* at 934. The First Circuit found that there were no prosecutors appointed at all, but that if counsel for the target of the grand jury investigation had acted as prosecutor in the Assistant United States Attorney's contempt hearing, it would have been improper. *Id.* at 933.

The appellate court upheld the procedures followed by the district court, holding that it was not reversible error for the court to proceed without appointing a special prosecutor in a criminal contempt action. *Id.* at 934. This decision is in direct contravention to the holding in *Young*.

The Fourth Circuit examined this issue in *United States v. Neal*, 101 F.3d 993 (4th Cir. 1996), holding that the district court committed plain error in failing to appoint an independent prosecutor. Although the defendant did not object to the fact that a special prosecutor was not appointed, the error was not waived. *Id.* at 999. The court concluded:

> Because errors "that render a trial fundamentally unfair" are not subject to harmless error review, the failure of the district judge to appoint an independent prosecutor to pursue the charge of indirect contempt is an error that affects substantial rights.

Id. (*citing Rose v. Clark*, 478 U.S. 570, 577-78 (1986)).

Contrary to *Young* and Rule 42(b), counsel for the plaintiffs in the civil action was allowed to prosecute Reed for the contempt. He presented evidence, cross-examined witnesses (including the petitioner) and argued the merits to the court. The Eleventh Circuit has addressed the issue of whether an independent prosecutor must be appointed to prosecute an individual for criminal contempt. It has followed the holding in *Young*, finding that an interested party cannot be appointed to prosecute a criminal contempt action. *See United States v. Yanks*, 882 F.2d 497 (11th Cir. 1989); *Midway Manufacturing Co. v. Kruckenberg*, 828 F.2d 13 (11th Cir. 1987). However, in this instance, the Eleventh Circuit has aligned itself with the First Circuit, which in turn is at odds with the Fourth Circuit over the issue of an independent prosecutor. The petition should be granted to reconcile these conflicting rulings.

II.

THE RIGHT TO BE PROSECUTED FOR A CRIME BY A DISINTERESTED PROSECUTOR IS A FUNDAMENTAL RIGHT WHICH MAY ONLY BE WAIVED BY THE INDIVIDUAL DEFENDANT.

The right to a disinterested prosecutor in a criminal contempt proceeding is a fundamental right that only the defendant himself may waive. The proceedings before the district court rest on a structural defect which negate any

finding. The Eleventh Circuit has erred in finding that the petitioner waived his right to have an independent prosecutor.

A structural error is error *per se* and requires reversal without regard to the underlying facts. *Arizona v. Fulminate*, 499 U.S. 279, 309-10 (1991). This absolute standard is different from trial errors occurring during the trial of the case which are subject a quantitative analysis in the context of other evidence presented. *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993), *quoting Fulminate*, 499 U.S. at 307-8. In essence, the Court has drawn a line between errors made by a referee during the game and those errors which change the very rules of the game.

In *United States v. Teague*, 953 F.2d 1525, 1531 (11th Cir. 1992) (en banc), the court found:

> Criminal defendants possess essentially two categories of constitutional rights: those which are waivable by defense counsel on the defendant's behalf, and those which are considered "fundamental" and personal to the defendant, waivable only by the defendant.

Examples of fundamental rights are the decisions whether to enter a guilty plea, waive a trial by jury or appeal. Rights which may be waived by defense counsel are matters which generally involve trial strategy and tactics.

> There can be no effective waiver of a fundamental constitutional right unless there is "an intentional relinquishment or abandonment of a known right or privilege."

Id. at 1533 (*citing Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

Because the right to an independent prosecutor is a fundamental right, Reed's counsel could not waive it.

> In analyzing claims involving those constitutional rights that are fundamental and personal, courts have consistently employed the procedural safeguard of an on-the-record waiver.

Id. at 1542-1543 (J. Clark, dissenting).

At the outset of the February 12, 1997 hearing, counsel for the petitioner stated that Reed waived the appointment of an independent prosecutor. (R8-2). However, the right to be prosecuted for a crime by a disinterested prosecutor is a right so fundamental that it cannot be waived by an individual's attorney. In *Young*, 481 U.S. at 809, the Court found that the right to a special prosecutor is fundamental.

No such on-the-record waiver is present in the instant case. The petitioner's counsel merely waived any objection to proceeding without a special prosecutor, but Reed himself was never questioned about the issue. (R8-2). In *United States v. Bushert*, 997 F.2d 1343, 1351 (11th Cir. 1993), the court found that in order for a sentence appeal waiver to be enforced, the government must show that either the district court specifically questioned the defendant about the appeal waiver, or that it is manifestly clear from the record that the defendant understood the full significance of the waiver.[1] Similarly, because Reed was not questioned about the waiver on the record, it must be

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1. The Court recently heard oral argument on the issue of whether the failure to advise a guilty pleading defendant of his right to appeal as required by Federal Rule of Criminal Procedure 32 is structural error automatically vesting the petitioner with post-conviction relief. *Peguero v. United States*, U.S. Sup. Ct. Docket No. 97-9217.

clear from the record that the petitioner understood the full significance of the waiver before that waiver can be considered valid.

Here, it is not manifestly clear that Reed understood he was waiving his right to an independent, unbiased prosecutor. Although the petitioner's attorney specifically waived any objection to proceeding with a private, interested attorney as prosecutor, Reed was never questioned by the court regarding his understanding of the significance of such a waiver, or if he, in fact, consented to it. (R8-2). Reed was present at the earlier hearing where the issue was discussed, but that alone does not indicate that he appreciated the significance of the waiver. (R7-3-8). Although Reed's attorney stated that he would discuss the issue with his client (R7-7), there is no indication from the record that such a discussion actually took place. (R8-2).

Young, 481 U.S. at 809, states that the right to an independent prosecutor in a criminal contempt case is fundamental. *United States v. Teague*, 953 F.2d at 1531, provides that fundamental rights can only be waived by the individual defendant. *United States v. Bushert*, 997 F.2d at 1351, holds that a waiver is knowing and voluntary only if the defendant was specifically questioned about it, or if it is manifestly clear from the record that the defendant understood the significance of the waiver. None of these procedural safeguards are present in this case.

Therefore, it was error for the Eleventh Circuit to hold that Reed waived his fundamental right to an independent prosecutor. His attorney unilaterally waived his right. The court did not question Reed on the record about the waiver. Additionally, it is not clear from the record that he understood the significance of the waiver or agreed to it.

CONCLUSION

For the reasons stated above, the Court should grant the petitioner's writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND DECIDED DECEMBER 3, 1998

In re: Russell **REED**, Contemnor-Appellant.

No. 97-8545.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

161 F.3d 1311; 1998 U.S. App. LEXIS 30630

December 3, 1998, Decided

* * *

OPINION BY: HATCHETT

OPINION: HATCHETT, Chief Judge:

In this appeal of a criminal contempt judgment, we hold that the district court did not err in failing to appoint an independent prosecutor in light of the appellant's waiver of the right to have an independent prosecutor appointed.

I. FACTS

Minority shareholders of General Builders Corporation (GBC) filed a derivative, class action lawsuit against former GBC majority shareholders and Brand Management Group, Inc. (Brand), the current GBC majority shareholders. Appellant Russell Reed is an owner of Brand. The underlying lawsuit alleged that Brand and Reed breached their fiduciary duties

and engaged in fraud and corporate waste. Following removal of the original lawsuit to federal court, the minority shareholders moved for the appointment of a receiver to operate GBC. In a September 5, 1996 consent order, all parties agreed to Ray Bowden's appointment as an independent company manager for GBC. The consent order granted Bowden full authority to manage the affairs of GBC. The consent order also gave Bowden sole authority to write company checks, enter agreements binding the company, convey or encumber company properties, elevate, hire and fire company officers, employees and consultants and to otherwise obligate GBC. Finally, the consent order suspended the board of director's authority during Bowden's appointment.

On December 16, 1996, Reed signed and filed a bankruptcy petition on behalf of GBC as "chairman/CEO" of the company. On December 19, 1996, the minority shareholders filed a motion for an order to show cause to determine why the court should not hold Reed in contempt for having "substantially interfered with the business" of GBC in that he signed and filed the bankruptcy petition on GBC's behalf. Specifically, the minority shareholders' motion alleged that Reed violated the consent order in: (1) hiring an attorney to represent GBC in connection with the bankruptcy proceeding; (2) filing a Chapter 11 bankruptcy petition on behalf of GBC; (3) sending out a notice firing one GBC employee and requiring another to report to Reed; and (4) committing numerous other acts purporting to act on behalf of GBC. In the alternative, the minority shareholders requested injunctive relief.

At a January 8, 1997 hearing, the district court advised that it would consider the contempt action as a criminal contempt pursuant to *18 U.S.C. § 401*, and that it would sever

the issues of contempt and injunctive relief. The court postponed the hearing on the contempt motion to allow Reed more time to prepare and to hire counsel specializing in criminal law. On January 9, 1997, the district court entered an order granting injunctive relief against Reed, authorizing company manager Bowden to dismiss the bankruptcy proceeding filed on behalf of GBC, and scheduling a non-jury proceeding to determine whether Reed should be "held in criminal contempt for his willful and wanton violation" of the September 5, 1996 consent order.

At the beginning of the criminal contempt hearing, defense counsel stated that Reed waived the appointment of an independent prosecutor. The contempt hearing proceeded with the minority shareholders' counsel assuming the prosecutorial role. At the conclusion of the hearing, the district court entered an order finding that Reed "wilfully violated the September 5, consent Order by filing for bankruptcy on GBC's behalf and, pursuant to the bankruptcy action, sending letters to GBC employees, including the Court-Appointed Receiver in charge of GBC, purporting to terminate these individuals' employment." The district court sentenced Reed to four months' imprisonment, the execution of which the court stayed pending resolution of this appeal.

II. STANDARD OF REVIEW

Generally, this court will not address an issue raised for the first time on appeal. See *United States v. McAllister, 77 F.3d 387, 389 (11th Cir.1996)*. Application of this rule, however, is at the discretion of the appellate court. See *Lattimore v. Oman Constr., 868 F.2d 437, 439 (11th Cir.1989)* (discretion to review pure question of law or to avoid injustice).

Appendix A

The district court's rulings on law are subject to de novo review. *United States v. Young, 107 F.3d 903 (D.C.Cir.1997).*

III. ISSUES

The issues we discuss are whether the district court violated Reed's procedural due process and the Federal Rules of Criminal Procedure 42(b) in: (1) failing to appoint an independent prosecutor to prosecute the criminal contempt proceedings; and (2) failing to afford proper notice and a reasonable time to prepare for the criminal contempt proceedings.

IV. DISCUSSION

A. Failure to Appoint Independent Prosecutor

Reed first contends that the district court erred in failing to appoint an independent prosecutor to pursue his criminal contempt proceeding. The government counters that Reed's argument fails not only because he neglected to establish the entitlement to such an appointment, but also because he waived any right to the appointment of an independent prosecutor when he affirmatively chose to proceed without one.

Federal Rules of Criminal Procedure 42(b), which governs indirect, out of court criminal contempt, provides in part:

> Rule 42. Criminal Contempt
>
> . . . .
>
> (b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision

> (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest.

Fed.R.Crim.P. 42(b). Through its terms, rule 42(b) does not require the appointment of an independent prosecutor to pursue an indirect, out of court criminal contempt citation.

In Young v. United States ex rel. Vuitton et Fils S.A., the Supreme Court held that counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order. *481 U.S. 787, 809, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987)*. The Young Court instructed federal courts to request that the United States Attorney's Office prosecute out of court criminal contempt charges, and, if the United States Attorney declines, to appoint as a special prosecutor a private lawyer other than the lawyer for an interested party. *481 U.S. at 801-02, 107 S.Ct. 2124.* Young further held that a district court's appointment of counsel for an interested party as a contempt prosecutor is not subject to a harmless error analysis. *481 U.S. at 810, 107 S.Ct. 2124.*

Since the Supreme Court's decision in Young, the two circuit courts of appeals to address the issue have split over whether rule 42(b), or the Supreme Court's decision in Young,

requires the appointment of an independent prosecutor in every out of court criminal contempt action. For example, in In re Grand Jury Proceedings, the First Circuit observed that *Young* did not decide whether the district court must appoint a prosecutor in all out of court contempt:

> In *Young*, the [Supreme] Court did not consider whether a court may ever conduct criminal contempt proceedings without first appointing any prosecutor at all. It can be argued that, lacking a prosecutor, the judge himself must fill the role, leading to an unacceptable confusion of roles and a violation of the separation of powers. See *Young, 481 U.S. at 815-25, 107 S.Ct. at 2141-47* (Scalia, J., concurring in judgment). Although the question is not free from doubt, we believe that not all out of court contempt proceedings are fatally flawed by the failure to appoint a prosecutor. Where, as here, the judge is impartial and the evidence is so simple that the judge is not diverted from the role of impartial judge and factfinder, we are not convinced that a prosecutor must be appointed.

875 F.2d 927, 933-34 (1st Cir.1989). Thus, the First Circuit concluded that rule 42(b) does not require the appointment of an independent prosecutor in every criminal contempt action — particularly not a contempt action where, as in this case, no challenge to the judge's impartiality exists and the evidence is not complex. *In Re Grand Jury Proceedings, 875 F.2d at 934*.

In United States v. Neal, the Fourth Circuit, taking a different approach, interpreted Supreme Court precedent to hold that the appointment of an independent prosecutor is required in all indirect out of court criminal contempt proceedings:

Appendix A

> At the time of Neal's hearing, the settled law of the Supreme Court was abundantly clear that the simultaneous assumption of the inconsistent roles of prosecutor and judge transgresses our most fundamental notions of procedural fairness. In *In re Murchison, [349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955),]* the Supreme Court held that it was error for a judge to initiate, prosecute, and adjudicate charges of indirect criminal contempt. *In re Murchison, 349 U.S. 133, 137-39, 75 S Ct. at 625-27, 99 L.Ed. 942*; see also *Young, 481 U.S. at 796-97, 107 S. Ct. at 2131-32* (accepting by implication that district court could not prosecute an indirect criminal contempt in ruling that the power to appoint a private attorney to prosecute indirect contempt was necessary to protect the authority of the judiciary).

101 F.3d 993, 998 (4th Cir.1996) (footnote omitted). The Fourth Circuit in *Neal* concluded that it was plain error affecting substantial rights, and therefore reversible error, for the district court to fail to appoint an independent prosecutor and, instead, act as both prosecutor and judge:

> Our review of the record convinces us that it is appropriate to notice the plain error of the district court. The melding of the judicial and prosecutorial functions is a fundamental error that undercuts the dispersion of power among the branches and, as a result, casts doubt on the integrity of the judicial process. To allow a district court to investigate the matter, call the witnesses for the prosecution, conduct the direct examination of them, and sit in judgment of the defendant undoubtedly undermines

> the fairness, integrity, and public reputation of judicial proceedings.

101 F.3d at 999-1000; see also *American Airlines, Inc. v. Allied Pilots Association, 968 F.2d 523, 531 (5th Cir.1992)* (holding that the district court erred when it "sua sponte initiated the contempt proceeding, questioned the witnesses and otherwise acted as prosecutor, and then decided all factual and legal issues").

Although the Eleventh Circuit has yet to address the issue of whether the district court is required to appoint an independent prosecutor in all out of court criminal contempt proceedings, this court need not decide the issue in this case because Reed expressly waived any right to have an independent prosecutor appointed.

On January 23, 1997, at the first in a series of hearings on the contempt motion brought against Reed, Reed's lawyer told the court that he had read the Fourth Circuit's decision in Neal, and that the case required on the district court to appoint an independent prosecutor.

> MR. BOTTS: As I was reading under U.S. v. Neal in late November, the court may be under some obligation to appoint an independent prosecutor in the case if it's a criminal contempt.
>
> THE COURT: I think I have the authority to use the attorney in this case for one of the parties who is charging the contempt, so that's who I plan to use.

MR. BOTTS: Right, but is that an independent one is all I am saying.

THE COURT: I am not sure they're independent. If you prefer to have a U.S. Attorney prosecute it, that's the normal procedure.

MR. BOTTS: Yes, sir, I understand the court can appoint somebody. My question is under the U.S. v. Neal is it an independent prosecutor —

THE COURT: Well, if you challenge the right of the party's attorney to prosecute Mr. Reed I will appoint a U.S. Attorney to do it. Maybe that's the best way to go particularly I understand you need some time.

Later, after the discussion over Reed's need to continue the proceedings, the district court revisited the issue of the need for the appointment of an independent prosecutor.

THE COURT: Since there is some concern on your part about having a party's attorney prosecute the matter, I will appoint an assistant U.S. Attorney to do so.

MR. BOTTS: That was — In my brief ability to research, I did find that case, and it did seem to indicate that it needed to be an independent prosecutor, and that was what was taken up on appeal as to whether the court could do it themselves or whether somebody else —

Appendix A

Following further discussions on scheduling, the district court again raised the issue of appointment of an independent prosecutor:

> THE COURT: Since there is a concern about a party's counsel prosecuting the matter, unless you have some other feeling about it, I am going to appoint an assistant U.S. Attorney to do so.
>
> MR. BOTTS: I can talk with my client about it.
>
> THE COURT: Why don't you do that and contact Adrienne and let us know what you want. Because if you are going to raise an objection about it, I am just going to go ahead and appoint an assistant U.S. Attorney. That's the safest thing.
>
> MR. BOTTS: Yes, sir.
>
> THE COURT: That also makes it a more important case, too.
>
> MR. BOTTS: No, I don't want to do that. I wasn't trying to say that. I was just trying to preserve his rights.
>
> THE COURT: Well, if that's going to be a reservation on your part, I will appoint an assistant U.S. Attorney.
>
> MR. BOTTS: What I want to do is go back and read the case a little bit more thoroughly, and I will let the court know.

When the district court indicated its preference to appoint an assistant U.S. Attorney to prosecute the contempt charges, Reed's counsel stated that he would discuss the matter with Reed before making a decision, and that counsel would advise the court of Reed's decision at the next hearing.

When the court reconvened on February 12, 1997, Reed's counsel told the court that he and his client had decided to waive the appointment of an independent prosecutor:

> THE COURT: First, before we hear from the plaintiff, I think I will ask the defendant if they are ready to proceed, and if they have any objections to the case proceeding before me.
>
> MR. BOTTS: No sir, I would certainly not have any objection to it appearing before you. We also waived any objection to the appointment of a special prosecutor in the case, also.

The most basic rights of criminal defendants are subject to waiver. See, e.g., *Peretz v. United States, 501 U.S. 923, 936, 111 S. Ct. 2661, 115 L. Ed. 2d 808 (1991)* (criminal defendant can waive objection to magistrate judge's supervision of jury selection in felony trial); *Levine v. United States, 362 U.S. 610, 619, 80 S.Ct. 1038, 4 L.Ed.2d 989 (1960)* (failure to object to closing of courtroom is waiver of right to public trial); *Segurola v. United States, 275 U.S. 106, 111, 48 S.Ct. 77, 72 L.Ed. 186 (1927)* (failure to object constitutes waiver of Fourth Amendment right against unlawful search and seizure); *United States v. Bascaro, 742 F.2d 1335, 1365 (11th Cir.1984)* (absence of objection is waiver of double jeopardy defense). In this case, Reed chose to forego his right to the appointment

of an independent prosecutor not merely in failing to object, but in affirmatively choosing to proceed without such appointment. Having decided after consultation with counsel, in open court, with full knowledge of the rights available to him under the Young and Neal decisions, Reed's waiver of his right to the appointment of an independent prosecutor was knowing, voluntary and effective.** It was Reed's choice whether to proceed without the appointment of an independent prosecutor, and it was a choice that he made in consultation with counsel. See *United States v. Teague, 953 F.2d 1525, 1533 (11th Cir.1992)* (en banc) ("This advice is crucial because no effective waiver of a fundamental constitutional right can exist unless there is an "intentional relinquishment or abandonment of a known right or privilege.' " *Johnson v. Zerbst, 304 U.S. 458, 462, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938))* (emphasis omitted). In fact, even in situations where this court prefers an on the record colloquy with a defendant before accepting a waiver, it has generally not imposed the preference as a requirement if other evidence existed in the record adequate to establish that the defendant knowingly and voluntarily waived his rights. See, e.g., *United States v. Bushert, 997 F.2d 1343, 1351 (11th Cir.1993)* (waiver of right to appeal valid even in

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** Reed alleges in his brief: "Counsel for Reed stated that he was waiving the requirement for an independent prosecutor and a neutral and impartial judge; the record, however, omits any reference as to whether the appellant had been apprised of his rights and personally waived the same." Reed, however, neglects to note that he was present throughout the proceedings, including the lengthy discussions concerning whether the court should appoint an independent prosecutor; that defense counsel advised the district court that he would discuss with Reed whether to request the appointment of a prosecutor; and, that defense counsel ultimately advised the court: "We also waived any objections to the appointment of a special prosecutor in the case, also."

absence of colloquy with defendant if "it is manifestly clear from the record that the defendant otherwise understood the full significance of the waiver.") For these reasons, Reed effectively waived his right to challenge the absence of an independent prosecutor to prosecute the contempt proceedings.

B. Notice

Reed also contends, again for the first time on appeal, that the district court violated procedural due process, and the safeguards of rule 42(b), when it failed to afford him proper notice and a reasonable time to prepare for the contempt proceedings. In contrast to his complaints on appeal, at the February 12, 1997 contempt proceeding, Reed did not object to the adequacy of the notice of the contempt charge, even when the court specifically questioned him:

> THE COURT: First, before we hear from the plaintiff, I think I will ask the defendant if they are ready to proceed, and if they have any objections to the case proceeding before me, one; and second, whether there is any question concerning the notice that's been given to the defendant as to the charges in the case.
>
> MR. BOTTS: No sir, I would certainly not have any objection to it appearing before you.... I am aware of the charges although a formal complaint has never been issued.
>
> . . . .

Basically, of course, we don't agree with what's set forth, but we know why we are here, if that's what it is, and it's about the court's order, whether he's in willful contempt of a previous order issued by the court, a consent order.

Several circuit courts of appeal have held that a contemnor may not raise on appeal the inadequacy of a contempt notice unless the contemnor made an objection before the district court. *In re Liberatore, 574 F.2d 78, 81-82 (2d Cir.1978)* (where alleged contemnor did not contend or even intimate in district court that the notice he had received was inadequate to comply with requirements of rule 42(b), he waived the issue); *United States v. Richardson, 638 F.2d 1189 (9th Cir.1980)* (where defendant failed to object in district court on the grounds of lack of preparation or lack of adequate notice of the contempt hearing, he may not complain for the first time on appeal). In failing to object in the district court to the adequacy of notice or his opportunity to prepare for the contempt proceedings, Reed waived this issue for purposes of appeal.

Despite his waiver, Reed's challenges fail on the merits as well. With respect to the adequacy of notice, and his opportunity to prepare, Reed first learned of the minority shareholders' request that he be held in contempt when the court served him with a copy of the minority shareholders' December 19, 1996 motion. The motion explained the relief the minority shareholders wanted: that the district court issue an order to show cause why the court should not hold Reed in contempt for having "substantially interfered with the business" of GBC when he signed and filed a bankruptcy petition on December 16, 1996, on behalf of GBC as "chairman/CEO" of the company. The district court then issued the order advising Reed of the minority shareholders' motion, and that the court would conduct

a hearing on January 8, 1997, at which time the court would require Reed "to show cause why an order should not be entered holding him in contempt of the Consent Order entered in this case on September 5, 1996."

At the January 8, 1997 show cause hearing, the district court advised Reed that it would consider the contempt action as a criminal contempt (*18 U.S.C. § 401*), and that it would hear only the motion for injunctive relief at this first hearing and sever it from the contempt motion. The court postponed the hearing on the contempt motion to allow Reed more time to prepare and to enlist counsel specializing in criminal law.

On January 9, 1997, in the order granting injunctive relief against Reed, the district court scheduled a non-jury proceeding to determine whether Reed should be "held in criminal contempt for his willful and wanton violation" of the September 5, 1996 consent order. When the contempt proceedings reconvened two weeks later on January 23, 1997, the court granted Reed a further continuance to allow him additional time to prepare for the contempt proceedings and to decide whether to request the appointment of an independent prosecutor to assist with the proceedings.

After hearing evidence and argument of counsel, the court found Reed guilty of willfully and intentionally violating the September 5, 1996 consent order. As these facts establish, the court afforded Reed ample notice of contempt proceedings and repeated opportunities for additional time to prepare for the hearing. Based on the record, no doubt exists that the court afforded Reed all of the procedural due process protections and procedural safeguards of rule 42(b).

Further, Reed argues that he never received a full and fair hearing on the contempt charges. He suggests that the January 8 hearing on the injunction motion served as the hearing on the contempt motion, and that the February 12 hearing "was in reality nothing more than an effort by Reed's counsel to mitigate the punishment that would follow from the contempt." At the first hearing, on January 8, after Reed's counsel requested additional time to prepare for the contempt proceedings, the district court advised that it would hear the request on the injunctive relief at the January 8 hearing, and that it would "put off the hearing on the contempt charges." At the conclusion of the January 8 hearing, the district court granted the minority shareholders' motion for injunction against Reed, and repeated that the contempt motion would be decided later. In a written order granting the motion for injunction, the district court scheduled hearing on the contempt motion. Only after Reed had retained criminal counsel did the contempt action proceed. The court held the contempt hearing on February 12, 1997. The district court advised Reed clearly that if he admitted the contempt charges, the court would proceed immediately to the sentencing phase. When asked how he responded, Reed denied the charges. At another point in the proceedings, defense counsel again acknowledged that the court postponed a decision on the contempt motion:

> MR. BOTTS: I have the transcript from the original hearing where your honor really delayed the contempt, criminal contempt finding and went into the tro [sic] or whatever was necessary then, and so I assume that everything in that would pertain to the criminal.

Appendix A

After obtaining counsel's consent, the court made the transcript of the previous hearing a part of the record in the contempt proceeding. After taking additional evidence and hearing argument of counsel, the court found Reed guilty of willfully and intentionally violating the September 5, 1996 consent order. On May 8, 1997, the court held a sentencing hearing, at the conclusion of which the court sentenced Reed to four months' imprisonment. Based on this record, it is difficult to hold that the February 12 proceedings was "nothing more than" a sentencing hearing. Reed's argument in this regard is specious.

V. CONCLUSION

For the foregoing reasons, the district court's judgment is affirmed.

AFFIRMED.

APPENDIX B — EXCERPTS OF HEARING DATED FEBRUARY 12, 1997

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DOCKET NO. 1:96-CV-735
ATLANTA, GEORGIA
FEBRUARY 12, 1997

MITCHELL PARTNERS, L.P., ET AL.

PLAINTIFFS,

V.

JANIS RISBERGS, ET AL.,

DEFENDANTS,

AND

GENERAL BUILDERS CORPORATION,

NOMINAL DEFENDANT.

EXCERPTS OF HEARING
BEFORE THE HONORABLE MARVIN H. SHOOB
SENIOR UNITED STATES DISTRICT JUDGE

* * *

Appendix B

[2] P R O C E E D I N G S

(ATLANTA, FULTON COUNTY, GEORGIA; FEBRUARY 12, 1997 IN OPEN COURT.)

* * *

THE COURT: I AM SORRY FOR THE DELAY IN COMING IN. WE HAD A SETTLEMENT CONFERENCE IN CHAMBERS THAT TOOK A LITTLE LONGER THAN WE HAD ANTICIPATED.

FIRST, BEFORE WE HEAR FROM THE PLAINTIFF, I THINK I WILL ASK THE DEFENDANT IF THEY ARE READY TO PROCEED, AND IF THEY HAVE ANY OBJECTIONS TO THE CASE PROCEEDING BEFORE ME, ONE; AND, SECOND, WHETHER THERE IS ANY QUESTION CONCERNING THE NOTICE THAT'S BEEN GIVEN TO THE DEFENDANT AS TO THE CHARGES IN THE CASE.

MR. BOTTS: NO, SIR, I WOULD CERTAINLY NOT HAVE ANY OBJECTION TO IT APPEARING BEFORE YOU. WE ALSO WAIVED ANY OBJECTIONS TO THE APPOINTMENT OF A SPECIAL PROSECUTOR IN THE CASE, ALSO. I AM AWARE OF THE CHARGES ALTHOUGH A FORMAL COMPLAINT HAS NEVER BEEN ISSUED.

* * *

Appendix B

[38] * * *

THE COURT: ALL RIGHT. GENTLEMEN, I FIND THE DEFENDANT IS GUILTY OF WILFULLY AND INTENTIONALLY VIOLATING THE COURT'S ORDER OF SEPTEMBER 5TH, 1996. I WILL ENTER A WRITTEN ORDER TO THAT EFFECT. BASICALLY THE FINDING IS MADE AS A RESULT OF HIS ENGAGING COUNSEL TO PUT THE COMPANY IN BANKRUPTCY AS CHARGED.

ADRIENNE, GIVE ME A SENTENCING DATE?

* * * *